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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 506

JACOB B. ZIMMERMAN, et al.,
Petitioners,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY,
Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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Much of respondent's brief deals with the merits of the litigation now awaiting trial and with arguments that the District Court's decision was erroneous for reasons not passed upon by the Court of Appeals. All of this is irrelevant to whether the legal questions presented by the decision of the Court of Appeals are of sufficient consequence to warrant review by this Court. We conceive that to be the only issue.

I.

The Court of Appeals reversed the District Court's order because whether this was a true class action and whether the plaintiffs were proper class representatives "can not be determined until after production of evidence

upon the merits." (R. 166) By thus prohibiting interlocutory relief based upon provisional findings as to the class facts, the Court of Appeals eliminated the possibility of obtaining interlocutory relief in class actions. As we read the respondent's brief, it concedes that this was the effect of the Court of Appeals' determination, and further concedes that if all the District Court did was maintain the status quo, the Court of Appeals decided an important question in a manner in conflict with this Court's prior decisions.

But the respondent asserts that the District Court's order did more than preserve the status quo (Resp. Br. 11) and argues that in such cases "a claim that the interests of stockholders not before the court are the same as those of the plaintiffs is not one to be established in cursory fashion" (Resp. Br. 13). The respondent then urges that a special hearing should have been had under Rule 42(b).

This argument simply emphasizes the importance of the question presented by the decision of the Court of Appeals: Is there any special limitation in class actions under Rule 23 upon the District Court's power to make provisional findings as a foundation for interlocutory relief of any kind?

Respondent never requested the District Court to hold a separate hearing under Rule 42(b); nor was there any occasion for a special hearing under Rule 42(b) since, as the District Court expressly found, "neither the answer nor the affidavits filed by defendants in opposition to the motion of plaintiffs deny the amount of the plaintiffs' holdings of preferred stock nor the representations made in connection with the Preferred Stockholders Protective Committee." (R. 114) The representations referred to in the District Court's finding are set out in the petition. (Pet. 5)

In any event, it is plain that the purpose and effect of the District Court's orders were to maintain the status quo. The District Court found that there were reasonable grounds to believe that the dividends in issue were produced by the plaintiffs' efforts. (R. 118) If that question were finally to be determined in favor of the plaintiffs, they would be entitled to compensation from those specific dividends and from nothing else. The District Court found that the dividends were about to be disbursed to 2800 shareholders, and that if disbursed there would be no practicable method of reaching them. (R. 118) The trial court in substance said that he was simply keeping the case in such a posture that he could effectively decide it, either for the plaintiffs or for the defendant.[1]

No new or secured status was conferred upon the plaintiffs in any sense different from the status conferred by any order prohibiting the distribution of funds until competing claims thereto can be determined. The District Court was confronted with the imminent distribution of the dividends. He maintained the status quo by preserving an adequate portion in an undistributed state pending the adjudication of claims thereto. This is a conventional —indeed, the most conventional—exercise of the equitable power to maintain the status quo.

II.

The respondent agrees that *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939), and *State Life Insurance Co.*

[1] Thus the Court said: "My dear sir, I am not going to allow a dollar of fees to anybody today, or until this case is determined in favor of the plaintiffs, if it ever is." (R. 77-78) And then, in response to objections by respondent to the entry of the impounding orders, the Court said: "You are just asking me to decide the case the other way. You mean that I must not decide it in favor of the other side, but you are now asking me to decide about this dividend on these affidavits." (R. 80)

v. *Board of Education,* 401 Ill. 252 (1948) hold "that allowances of attorneys' fees are not confined to true class suits." (Resp. Br. 13) The Court of Appeals expressly held that the orders entered below were premature and beyond the trial court's power because whether the plaintiffs are entitled to reimbursement in the view of the Court of Appeals depended upon an ultimate finding that plaintiffs ". . . have shown that they represent a class in such manner and to such extent as to make of this a true class action." (R. 166) A plainer case of direct conflict would be hard to find.

Respondent asserts that the authorities cited do not control this case because here some stockholders may not deem the objects of the litigation to be wise or prudent.[2] The Court will note that in the *State Life Insurance* case, the controversy was directly between warrant holders over the method of distribution upon their warrants. The Supreme Court of Illinois allowed reimbursement to the plaintiffs for having determined the correct rule of distribution, despite the fact that the rule established was opposed by some of the persons charged with the fees. And see the earlier decision on the merits which clearly exposed this point. Id., 394 Ill. 301, 309 (1946).

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[2] So far as the record discloses, this is a purely hypothetical assumption. A large shareholder who had appeared in opposition to the impounding orders expressly disclaimed opposition to the objects of the litigation. (R. 85, 100) Petitioners provided the trial court with unchallenged affidavits showing that they had circularized the entire class, that over 100 shareholders had supported the action, and that they knew of the opposition of none. (R. 114, 50-51) Respondents in their brief have gone outside the record to refer to a subsequently formed shareholders committee allegedly representing some 769 preferred shareholders. (Resp. Br. 1) Petitioners' objection to the motion of that committee for leave to file a brief amicus discloses that its representation is suspect. In addition, petitioners have subsequently secured written authorizations from more than 650 shareholders authorizing the prosecution of the litigation.

III.

In asserting that "the question whether this is a true class action is primarily one of fact", the respondent fully supports the position taken by the Court of Appeals and emphasizes the need for review by this Court. (Resp. Br. 14)

Whether or not, as Rule 23(a) requires, "the Right sought to be enforced for or against the class is common" is exclusively a question of law determinable from the pleadings in this case. *Hartford Life Insurance Co.* v. *Ibs,* 237 U.S. 662 (1915) and the other cases cited in the petition for certiorari, make clear that a shareholder's suit to compel the declaration of dividends is a suit to enforce such a right. The language quoted by respondent from the *Hartford* case (Resp. Br. 14) means no more than that an allegation that an action is a class action is not conclusive if unsupported by the balance of the complaint. But here, as in the *Ibs* case, the complaint, unchallenged in this respect, shows on its face that the rights sought to be asserted on behalf of the class are common to all, and hence that the action is a true class action. The conclusion that evidence is required requires review.

Respondent then argues, however, that whether or not representation by the plaintiffs "will fairly insure the adequate representation of all", is a question of fact that can not rest on a general allegation in the complaint. (Resp. Br. 14) Petitioners so concede. But this is far different from holding, as did the Court of Appeals, that this question of fact can not be provisionally determined for purposes of granting interlocutory relief. The District Court expressly found that:

> "The plaintiffs have brought the action in a representative capacity on behalf of all other stockholders similarly situated. Neither the answer nor the affi-

davits filed by defendants in opposition to the motion of plaintiffs deny the amount of the plaintiffs' holdings of preferred stock nor the representations made in connection with Preferred Stockholders Protective Committee." (R. 114)

These representations are set out in the petition (Pet. 5), and fully establish for purposes of interlocutory relief the adequacy of the plaintiffs' representation. The bare denial of the plaintiffs' representative character in respondent's unverified answer can not foreclose the District Court from making a provisional finding.

Hansberry v. *Lee,* 311 U. S. 32 (1940), relied upon by respondent (Resp. Br. 15) in fact confirms petitioners' view. For that case rests on the premise that where the plaintiffs have an identity of legal interest with the persons whom they purport to represent, they may bring a class action.

IV.

Respondent rests its major opposition to the petition upon the ground that in any event the Court of Appeals reached the correct conclusion since the orders of the District Court amounted to equitable attachment. This, respondent says, is prohibited both by the decisions of this Court and those of the Illinois Supreme Court. (Resp. Br. 8-11) We agree that equitable attachment is improper under Illinois law, and under the decisions of this Court, where applicable.

The argument, of course, does not go to the importance of the questions decided by the Court of Appeals. No part of its conclusion rests upon a determination that the orders of the District Court constituted equitable attachment. Respondent's argument is therefore wholly irrelevant as an answer to the petition for certiorari.

In any event the District Court's orders did not amount to equitable attachment. The distinction between equitable attachment and the ordinary equitable order, impounding or restraining the disposition of property pending ultimate determination of the cause, is clear. In equitable attachment, property is seized wholly unrelated to the objects of the action, while in the familiar equitable order maintaining the status quo, property is held pending determination of competing claims with respect to that very property. Here, if the plaintiffs had in fact produced the dividend that was about to be distributed, they had a claim to a portion of that very dividend and to nothing else. The District Court's impounding order did not seize unrelated assets for the purpose of satisfying a future unrelated claim.

This distinction between equitable attachment and what transpired here is made transparently clear by the decision of this Court in *DeBeers Mines* v. *United States,* 325 U.S. 212 (1945), relied upon by respondent. (Resp. Br. 10) In that case this Court reversed a District Court's order seizing assets of the defendant wholly unrelated to the subject matter of the litigation, because equivalent to equitable attachment. But this Court took pains to point out that the result would have been different had the seized assets been assets that might have been the subject of the final decree. As this Court said (at 220):

> "A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally. The injunction in question is not of this character. It is not an injunction in the cause, and it deals with a matter lying wholly outside the issues in the suit.
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> "The respondent refers us to certain cases as analogous but upon examination, they are all found to be cases in which an interlocutory injunction was

> granted with respect to a fund or property which would have been the subject of the provisions of any final decree in the cause. * * * " (Footnotes omitted.)

This distinction fully explains *Dunham* v. *Kauffman,* 385 Ill. 79 (1944) and *Lewis* v. *West Side Trust & Savings Bank,* 288 Ill. App. 271 (1st Dist. 1937), relied upon by respondent.

Illinois cases taking action analogous to that of the District Court are too numerous to set out. Included among them are the following: *Deir* v. *Retirement Board,* 311 Ill. App. 369 (1st Dist. 1941); *Fishwick* v. *Lewis,* 258 Ill. App. 402 (3rd Dist. 1930); *McDougall Company* v. *Woods,* 247 Ill. App. 170 (1st Dist. 1928); *Young* v. *Federal Union Surety Company,* 183 Ill. App. 278 (1st Dist. 1913). This difference between equitable attachment and orders to maintain the status quo is uniformly recognized. Annotation, 116 A.L.R. 270, 311 (1938).

CONCLUSION.

The relief granted by the District Court, although novel, conforms to sound equitable principles and plain common sense. That it is novel is due to the novelty of the fact situation that gave rise to it. For seldom, if ever before, has the pressure of pending shareholders' litigation compelled the declaration of dividends. But that the relief is novel is no basis for condemning it. As this Court put it in *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 167 (1939):

> "As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility."

And the point has been made effectively by the Illinois Supreme Court in *First National Bank* v. *Bryn Mawr Beach Building Corporation,* 365 Ill. 409, 421 (1937), where the court, in approving a vast innovation in equity jurisprudence in Illinois said:

> "The above and similar cases, though not deciding the question here, evidence a recognition by this court that rules of equity jurisdiction have developed and are developing, and that judicial proceedings must be adjusted to facts as they are. All who are conversant with the history of equity jurisprudence know that as a distinct system it has been of constant growth and development from its inception, covering a period of hundreds of years. 'The jurisdiction of a court of equity does not depend upon the mere accident whether the court has, in some previous case or at some distant period of time, granted relief under similar circumstances, but rather upon the necessities of mankind, and the great principles of natural justice, which are recognized by the courts as a part of the law of the land, and which are applicable alike to all conditions of society, all ages, and all people.' (*Dodge* v. *Cole,* 97 Ill. 338)."

For the reasons heretofore assigned, the petition for certiorari should be granted.

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